

**DEX C**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

EDWARD L. GILMORE, . Civil Action No. 1:13cv789  
. Plaintiff,  
. vs. . Alexandria, Virginia  
. May 16, 2014  
ERIC HOLDER, in his official . 10:14 a.m.  
capacity as Attorney General .  
of the United States,  
. Defendant.  
. . . . .

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: AMANDA L. MAJOR, ESQ.  
AMY P. KAPLAN, ESQ.  
Wilmer Cutler Pickering Hale and  
Dorr LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

FOR THE DEFENDANT: R. JOSEPH SHER, AUSA  
AYANA N. FREE, AUSA  
United States Attorney's Office  
2100 Jamieson Avenue  
Alexandria, VA 22314

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Fifth Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

(Pages 1 - 21)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 of his EEO complaint.

2                   And so the last issue, of course, then is the  
3 defendant's motion for summary judgment. This is a really  
4 tough case. I spent more time on this case than I have on a  
5 Title VII case in a long time because as I said, this is a  
6 plaintiff who clearly had a lot of very, very positive  
7 qualifications.

8                   The problem the government has in this case is that  
9 the testimony of Mr. Guevara is, I think, enough to have this  
10 case go to trial. Guevara was up until the last couple of  
11 months before this decision made, he was the direct supervisor  
12 of Mr. Gilmore, and he really raved about him.

13                  The government's description of Guevara was not  
14 completely accurate in its brief. It is not the case that  
15 Guevara did not recommend him. The evidence that I see in this  
16 case is Guevara was never asked. So yeah, he didn't recommend  
17 him, but it's not because he didn't recommend him. He was  
18 never asked about him, and he has said that if he were to have  
19 been asked, he would have recommended him.

20                  I think particularly interesting in terms of an  
21 exhibit in this case is the exhibit of the Career Board minutes  
22 back in 2005, when Mr. Gilmore was at that time still working  
23 in the aviation area and was asking for a lateral transfer into  
24 this GS-15 position, and I'm sure since it's an exhibit,  
25 you-all looked at that carefully, but that is a fascinating

1 exhibit because of it's a transcript, and you hear people  
2 actually talking about Mr. Gilmore, and Guevara is adamant in  
3 that discussion that Gilmore has all of the qualifications  
4 needed for the deputy chief inspector of the Office of Security  
5 Programs, because what that job involves, it's not an  
6 investigatory job. It's a job that provides security for  
7 personnel, for buildings, and for IT systems. It requires the  
8 management of complex contracts, and I think he says in that  
9 conversation that the biggest, one of the biggest contracts the  
10 DEA had at that point was being managed by -- was involved in  
11 that office.

12 So his testimony alone in my view creates a material  
13 issue of fact about the qualifications of Mr. Gilmore for the  
14 position, in addition to which there is, I think, a legitimate  
15 factual question as to whether or not this insistence upon  
16 street-level law enforcement experience was a realistic  
17 qualification for that particular position.

18 The other thing that is problematic is whether, in  
19 fact, the amount of law enforcement experience which Gilmore  
20 had -- and it's uncontested that he was a street cop in Chicago  
21 for several years and he had been a regular special agent  
22 working for two or three years when he joined the DEA, so he  
23 had -- he did have law enforcement experience. It wasn't  
24 current, and I think not having current experience could be,  
25 could be a legitimate factor, depending upon the particular

1 position that someone was applying for, but in this case, in  
2 terms of the prima facie case, this plaintiff clearly is a  
3 member of a protected group. He's African American. He was  
4 clearly qualified or well qualified for this position. He  
5 applied for the position, and the person who got the position  
6 was not from his protected group and was not as highly rated on  
7 one index, on this SES qualification index, she wasn't as  
8 highly rated as he. I mean, those are uncontested facts.

9 Now, whether or not the final decision to put her in  
10 the position over Mr. Gilmore was tainted or affected by his  
11 race is the big question in this case, and it's a very big  
12 question. I really don't know because I haven't seen the  
13 witnesses testify, and that's why this case will have to go to  
14 trial if you don't settle it. It's a close call.

15 I will say that given what I think are all the bona  
16 fides of this plaintiff, if the, if the jury gets wind that the  
17 witnesses are hedging or saying things inaccurately, I think  
18 the inference they will draw will be against the government.

19 On the other hand, I will also say that there's  
20 clearly again from that same Career Board set of minutes some  
21 very interesting comments by the deputy administrator,  
22 Ms. Leonhart, because she's talking about the problem that  
23 Mr. Gilmore has in wanting to even get that position because  
24 it's another headquarters position, and so, I mean, there's  
25 clearly evidence in this record that back in 2005, there were

1 concerns about is this the smartest career move for this man  
2 because by keeping himself out of the field and staying at  
3 headquarters, does he become less eligible for SES positions,  
4 and there is some evidence in this record that the  
5 administrator felt that the people who should be going into SES  
6 positions should have an extensive amount of field experience.  
7 That's not an irrational approach in a law enforcement agency.

8 So what I'm saying to both sides is this is a really  
9 tough case, and it's not by federal standards a big dollar  
10 case. That's why I started looking at the damages issue to  
11 begin with.

12 So I'm denying the government's motion for summary  
13 judgment. This case has too many unanswered issues. The case  
14 will totally focus on whether the reasons given are pretextual  
15 or whether they're genuine, and I think that there are really  
16 good reasons why a jury could find that they were genuine, but  
17 based upon credibility determinations, they could also find  
18 that they were not fair. That being the case, this is a case  
19 where I really think wise folks should sit down and try to work  
20 it out, so I leave it with you at that.

21 The case is set for trial to begin on Monday,  
22 June 16. If you plan -- if you can't work it out and it's  
23 going to go to trial, then I will -- if you're going to have  
24 any motions in limine, I do not take them on the morning of  
25 trial. You'll need to schedule them ahead of time, and I'm not